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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

MARY PEREZ etc., Plaintiff and Appellant, v. POMONA VALLEY HOSPITAL MEDICAL CENTER, Defendant and Respondent.	B205546 (Los Angeles County Super. Ct. No. KC049398)

APPEAL from a judgment of the Superior Court of Los Angeles County, Peter J. Meeka, Judge. Affirmed.

The Karl W. Schoth Law Firm and Karl W. Schoth for Plaintiff and Appellant.

Lewis Brisbois Bisgaard & Smith LLP, L. Susan Snipes and Judith M. Tishkoff for Defendant and Respondent.

The trial court granted summary judgment on the complaint by appellant Mary Perez (Perez) against respondent Pomona Valley Hospital Medical Center (Medical Center). We affirm.

RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

Perez initiated the underlying action in November 2006. Her first amended complaint, filed February 14, 2007, asserted claims for neglect and elder abuse (Welf. & Inst. Code, §§ 15610.57, 15657) against respondent. The complaint alleged the following facts: In 2005, Perez's 58-year-old husband Robert suffered from metastatic renal cell carcinoma. On June 20, 2005, Robert Perez was taken to the Medical Center's emergency room, and he remained in the Medical Center until July 9, 2005. Upon arrival, he could not care for himself, but was free from pressure ulcers. While Robert Perez was in the Medical Center, its employees did not follow pressure ulcer prevention protocols, and did not record that he was developing pressure ulcers. On July 10, 2005, he was transferred to Casa Colina Rehabilitation Hospital (Casa Colina), where his pressure ulcers were discovered. He was readmitted to the Medical Center, and received treatment for his ulcers, including surgery.

Trial was set for November 26, 2007. On August 10, 2007, the Medical Center filed a motion for summary judgment, contending that Robert Perez had no pressure ulcers when he left respondent on July 9, 2005, and that after entering Casa Colina, he developed Fournier's Gangrene, a condition which -- though related to his underlying medical problems -- could not have been predicted or prevented by respondent's employees. The motion was supported by a declaration from Irving Posalski, M.D. The hearing on the motion was set for October 26, 2007, and Perez's opposition was due on or before October 12, 2007.

Perez did not respond to the summary judgment motion until October 23, 2007, when she filed an ex parte application for orders continuing the hearing and the trial, and for orders compelling further discovery. The trial court denied the application. On October 26, 2007, Perez filed an opposition to the motion and a "response" to the Medical Center's separate statement of undisputed facts. At the hearing on the motion, which occurred on the same day, Perez asked the trial court to consider her opposition and supporting documents, and raised objections to the Medical Center's evidentiary showing, including Posalski's declaration. The trial court denied Perez's request, struck her opposition and "response," and granted summary judgment in the Medical Center's favor. Judgment was entered accordingly on November 27, 2007.

DISCUSSION

Perez contends (1) that the trial court improperly denied her an opportunity to conduct further discovery prior to ruling on the summary judgment motion, and (2) that the Medical Center failed to carry its burden on summary judgment. For the reasons explained below, we disagree.

A. *Denial of Discovery*

Perez contends that the trial court erred in denying her ex parte application for a continuance to conduct further discovery.

1. *Governing Principles*

The summary judgment statute provides: "If it appears from the affidavits submitted in opposition to a motion for summary judgment or summary adjudication or both that facts essential to justify opposition may exist but cannot,

for reasons stated, then be presented, the court shall deny the motion, or order a continuance to permit affidavits to be obtained or discovery to be had or may make any other order as may be just. The application to continue the motion to obtain necessary discovery may also be made by ex parte motion at any time on or before the date the opposition response to the motion is due." (Code Civ. Proc., § 437c, subd. (h).)

This provision "mandates a continuance of a summary judgment hearing upon a good faith showing by affidavit that additional time is needed to obtain facts essential to justify opposition to the motion." (*Cooksey v. Alexakis* (2004) 123 Cal.App.4th 246, 253-254.) To mandate a continuance, an affidavit must show: "(1) the facts to be obtained are essential to opposing the motion; (2) there is reason to believe such facts may exist; and (3) the reasons why additional time is needed to obtain these facts. [Citations.]" (*Wachs v. Curry* (1993) 13 Cal.App.4th 616, 623.) Thus, "[i]t is not sufficient under the statute merely to indicate further discovery or investigation is contemplated." (*Roth v. Rhodes* (1994) 25 Cal.App.4th 530, 548.)

In contrast, a continuance is not mandatory when no adequate affidavit has been submitted (*Cooksey v. Alexakis*, *supra*, 123 Cal.App.4th at pp. 253-254) or the request for a continuance is untimely (*Tilley v. CZ Master Assn.* (2005) 131 Cal.App.4th 464, 490-492; see *Ambrose v. Michelin North America, Inc.* (2005) 134 Cal.App.4th 1350, 1353). We review the denial of a continuance on these grounds for an abuse of discretion. (*Cooksey v. Alexakis*, *supra*, 123 Cal.App.4th at pp. 253-254; *Tilley v. CZ Master Assn.*, *supra*, 131 Cal.App.4th at pp. 490-492.)

2. *Underlying Proceedings*

Perez submitted nothing in response to the Medical Center's summary judgment motion before she filed her ex parte application for a continuance on October 23, 2007, 11 days after her opposition was due, and 3 days before the hearing on the motion. The application contended that a continuance was necessary to permit Perez to acquire evidence for use in her opposition to the motion.

Perez's application relied on a declaration from her counsel, Karl Schoth, who stated that he had deposed four doctors and three nurses employed by the Medical Center, but had yet to conduct the depositions of eight additional nurses and therapists. Schoth originally scheduled the depositions of some these witnesses in June 2007, but postponed them due to calendar conflicts. According to Schoth, counsel for the Medical Center agreed to provide new dates for the depositions, but did not do so. Schoth stated: "No dates were ever provided, so timely I re-noticed all eight [] for October of this year, but again I am still waiting for dates."

Schoth's declaration attributed his delay in filing the ex parte application to the arrest of his nephew on October 4, 2007 in Victorville. According to Schoth, he had been "pre-occupied and out of [his] office for extended periods of time trying to help [his] nephew [] who was . . . charged with three [] felonies on October 9[]." Schoth so advised defense counsel by voice mail on October 10 and spoke to defense counsel's secretary on October 11.

Accompanying Schoth's declaration was a copy of a letter dated October 19, 2007, which he had faxed to L. Susan Snipes, who represented the Medical Center. Schoth's letter described three unsuccessful attempts to contact Snipes since October 10; proposed that the parties stipulate to continuances of the hearing

on the summary judgment motion and the trial to facilitate discovery; and provided notice of Perez's impending ex parte application.

On October 23, 2007, the Medical Center filed an opposition to Perez's ex parte application. Snipes's supporting declaration provided a conflicting version of the underlying events. According to Snipes, the Medical Center provided three witnesses for depositions on July 18, 2007, and additional depositions were scheduled for July 19 and 20, 2007. At the conclusion of the July 18 depositions, Schoth stated that he could not go forward with the remaining depositions. Snipes told him that the depositions would be problematic to reschedule due to the deponents' shiftwork, and asked Schoth to give her "plenty of lead time" if he wanted to take the depositions.

Snipes further stated that she waited until "the last possible" day to serve the Medical Center's summary judgment motion -- that is, August 6, 2007 -- to provide Perez "the most possible time to conduct discovery." On September 28, 2007, Perez unilaterally noticed the depositions of three individuals whose depositions had originally been set in July 2007. Perez sought to take the depositions on October 15 and 16, 2007. Snipes objected to the notice of depositions on several grounds, including that she was unavailable on the dates set for the depositions. On October 9, 2007, Snipes received Perez's designation of expert witnesses.

Snipes further stated that on October 11, 2007, she went on a four-day vacation to a remote area of California. When she checked in with her office on October 13, she found an October 10 voice mail message from Schoth and an October 10 note from her secretary about a call from Schoth. Schoth had requested a continuance of the hearing on the summary judgment motion, pointing to "family issues." Schoth's messages did not mention the pending depositions.

As the deadline for Perez's opposition had elapsed, Snipes did not respond to Schoth's request. Snipes heard nothing more from Schoth until October 22, when she discovered a voice mail message from Schoth dated October 19 and received his letter of the same date. Accompanying Snipes's declaration were copies of her secretary's note regarding Schoth's October 11 phone call, Snipes's formal objections to the September 28 notice of depositions, Perez's designation of expert witnesses, and Snipes's written response to Schoth's October 19 letter.

On October 23, 2007, the trial court denied Perez's ex parte application without a hearing. On October 26, prior to the hearing on the summary judgment motion, Perez filed an opposition and a response to the Medical Center's separate statement. At the hearing on the summary judgment motion, Schoth asked the trial court to consider Perez's untimely opposition papers, arguing that his declaration in support of Perez's ex parte application established a reasonable basis for his delay in filing them. In granting summary judgment, the trial court denied the request as an improper oral motion for reconsideration under Code of Civil Procedure section 1008.

3. *Analysis*

We conclude that the trial court properly denied Perez's ex parte application.[1] As the application was filed after the deadline for Perez's opposition, it fell outside the provision of the summary judgment statute governing continuances, and was instead subject to the principles that ordinarily govern requests for continuances. (*Tilley v. CZ Master Assn., supra*,

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[1] Because Perez does not argue that the trial court erred in denying her request to file untimely opposition papers, she has forfeited any such contention.

131 Cal.App.4th at pp. 490-492 [untimely ex parte application to continue hearing on summary judgment motion fell outside parameters of Code of Civil Procedure section 437c, subdivision (h), and court was under no obligation to grant it].)[2] Generally, "[t]he decision to grant or deny a continuance is committed to the sound discretion of the trial court. [Citation.] The trial court's exercise of that discretion will be upheld if it is based on a reasoned judgment and complies with legal principles and policies appropriate to the case before the court. [Citation.]" (*Forthmann v. Boyer* (2002) 97 Cal.App.4th 977, 984-985.) When, as here, the record does not reflect the grounds for the discretionary ruling, we will affirm it on any basis properly supported by the record. (*In re Marriage of Burgess* (1996) 13 Cal.4th 25, 32.)

We discern no abuse of discretion. The sole ground that Perez asserted for the continuance was her purported need to take the depositions of several witnesses. However, Schoth's declaration contains no explanation of the relevance of the depositions to the issues raised in the Medical Center's motion. This deficiency alone is sufficient to support the trial court's ruling. (*Combs v.*

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[2] Perez contends that a continuance was mandatory under the summary judgment statute, pointing to *Conn v. National Can Corp.* (1981) 124 Cal.App.3d 630; *Wachs v. Curry*, *supra*, 13 Cal.App.4th 616; *People ex rel Dept. of Transportation v. Outdoor Media Group* (1993) 13 Cal.App.4th 1067, and *Bahl v. Bank of America* (2001) 89 Cal.App.4th 389. Her reliance on these cases is misplaced, as none suggests that the trial court must grant a continuance when the request is untimely under the statute. (*Conn v. National Can Corp.*, *supra*, 124 Cal.App.3d at p. 636 [parties stipulated to an expedited hearing on summary judgment motion, and no continuance was requested]; *Wachs v. Curry*, *supra*, 13 Cal.App.4th at pp. 622-624[trial court properly denied request for continuance under summary judgment statute due to inadequate affidavits]; *People ex rel Dept. of Transportation v. Outdoor Media Group*, *supra*, 13 Cal.App.4th at p. 1077 [same]; *Bahl v. Bank of America*, *supra*, 89 Cal.App.4th at pp. 392-400 [under summary judgment statute, trial court improperly denied timely request for continuance supported by adequate affidavits].)

Skyriver Communications, Inc. (2008) 159 Cal.App.4th 1242, 1270; *Cooksey v. Alexakis*, *supra*, 123 Cal.App.4th at pp. 254-255.)

Moreover, the Medical Center submitted evidence that it did not file its summary judgment motion until the last permissible date, August 10, 2007, thus giving Perez the greatest possible opportunity to complete discovery before filing her opposition. Not until weeks later, in late September 2007 and before the arrest of Schoth's nephew, did Schoth notice the depositions of several of the pertinent witnesses for October 15 and 16, 2007 -- dates *after* Perez's opposition was due. In view of this evidence, the trial court could properly have found that Perez had not been prevented from timely completing discovery necessary to oppose the motion for summary judgment, and had failed to demonstrate that the witnesses Schoth sought to depose possessed evidence relevant to Perez's opposition. (*Gibson v. Cobb* (1965) 236 Cal.App.2d 226, 237 [continuance to secure presence of absent witness was properly denied, as there was substantial evidence that the witness's testimony was not essential].) In sum, the trial court did not err in denying Perez's application for a continuance.

B. *Propriety of Summary Judgment*

Perez contends that the trial court erred in granting summary judgment in favor of the Medical Center. She argues that the Medical Center's motion relied on inadmissible evidence, including Posalski's declaration, and thus the Medical Center failed to carry its initial burden on summary judgment.

1. *Governing Principles*

Generally, "[a] defendant is entitled to summary judgment if the record establishes as a matter of law that none of the plaintiff's asserted causes of action

can prevail. [Citation.]" (*Molko v. Holy Spirit Assn.* (1988) 46 Cal.3d 1092, 1107.) The defendant may carry this burden by showing "that the plaintiff cannot establish at least one element of the cause of action -- for example, that the plaintiff cannot prove element X." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 853, italics deleted.) "'Review of a summary judgment motion by an appellate court involves application of the same three-step process required of the trial court. [Citation.]'" (*Bostrom v. County of San Bernardino* (1995) 35 Cal.App.4th 1654, 1662.) The three steps are (1) identifying the issues framed by the complaint, (2) determining whether the moving party has made an adequate showing that negates the opponent's claim, and (3) determining whether the opposing party has raised a triable issue of fact. (*Ibid*.)

Under these principles, the defendant, as moving party, will prevail when the plaintiff does not respond to the motion, unless the defendant's evidentiary showing is insufficient to carry its initial burden. (*Witchell v. De Korne* (1986) 179 Cal.App.3d 965, 974.) On appeal, Perez contends that the Medical Center's showing is subject to fatal objections.[3] As we explain below, (1) the Medical Center's showing was sufficient to carry its initial burden, and (2) Perez's evidentiary objections were without merit.

2. *Adequacy of the Medical Center's Showing*

Setting aside Perez's objections, we conclude that the Medical Center submitted sufficient evidence that Perez's claims failed. The elements of Perez's

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[3] The Medical Center argues that Perez forfeited her objections because she did not submit them in writing or obtain rulings on them from the trial court. Schoth repeatedly asserted the pertinent objections on the record at the hearing, but the trial court declined to rule on them, apparently because they were not in written form. It is unnecessary for us to address this contention, as we conclude that Perez's objections lack merit.

claims for elder abuse and neglect are determined by statute, namely, the Elder Abuse and Dependent Adult Civil Protection Act (Elder Abuse Act) (Welf. & Inst. Code, § 15600 et seq.) (*Intrieri v. Superior Court* (2004) 117 Cal.App.4th 72, 82.) Aside from specifying forms of abuse and neglect (Welf. & Inst. Code, §§ 15610.30, 15610.57, 15610.63), the Elder Abuse Act provides that actionable abuse and neglect involves conduct that (1) causes harm or suffering, or (2) denies treatment needed to prevent harm or suffering (Welf. & Inst. Code, § 15610.07).[4] (See *Norman v. Life Care Centers of America, Inc.* (2003) 107 Cal.App.4th 1233, 1239, 1247.)

In seeking summary judgment, the Medical Center relied primarily on Posalski's declaration. Posalski set forth his qualifications as a physician specializing in infectious diseases, including Fournier's Gangrene; stated that he had reviewed Robert Perez's medical records, including a wound risk assessment prepared by a nurse at Casa Colina on July 9, 2005, when he was transferred to Casa Colina; and described the events following the nurse's discovery of a wound near Robert Perez's scrotum. Posalski opined that the wound was a form of Fournier's Gangrene, which is associated with diabetes and poor blood circulation; that it appeared for the first time on July 9, 2005; and that there was nothing the Medical Center's nursing staff could have done to predict or prevent the wound prior to its appearance. In addition, Posalski stated that he was familiar with the standard of care applicable to acute care facilities, and opined that the Medical Center had complied with this standard of care.

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4 Section 15610.07 of the Welfare and Institutions Code states: "Abuse of an elder or a dependent adult" means either of the following: [¶] (a) Physical abuse, neglect, financial abuse, abandonment, isolation, abduction, or other treatment with resulting physical harm or pain or mental suffering. [¶] (b) The deprivation by a care custodian of goods or services that are necessary to avoid physical harm or mental suffering."

In our view, Posalski's declaration shifted the burden on summary judgment to Perez. Viewed in the context of the allegations in Perez's first amended complaint, Posalski's declaration identified the wound that Robert Perez displayed at Casa Colina as Fournier's Gangrene, rather than a pressure ulcer. According to Posalski, the Medical Center and its employees did nothing to cause Robert Perez's wound, and could have done nothing to prevent it. The Medical Center thus tendered sufficient evidence that Perez could not establish at least one element of her causes of action. (*Aguilar v. Atlantic Richfield Co.*, *supra*, 25 Cal.4th at p. 853.)

3. *No Meritorious Objections*

Turning to Perez's evidentiary objections, we conclude that they do not preclude summary judgment in the Medical Center's favor. Perez raised three objections at the hearing on the summary judgment motion. First, she contended that Posalski's declaration was inadmissible, as the Medical Center filed a copy of the signed declaration with its motion on August 10, 2007, but did not file the signed original declaration until August 28, 2007. Assuming -- without deciding -- that this amounted to a defect in the Medical Center's moving papers, it does not support a reversal of the judgment. Generally, "the trial court has discretion under Code of Civil Procedure section 437c to overlook procedural errors in the moving and opposition papers," provided "the evidence presented warrants it." (*Zimmerman, Rosenfeld, Gersh & Leeds LLP v. Larson* (2005) 131 Cal.App.4th 1466, 1478.) Here, nothing suggests that the belated submission of Posalski's original signed declaration impaired Perez's opportunity to oppose the motion; on the contrary, she was fully apprised of the evidentiary basis for the motion upon its filing.

Second, Perez contended that Posalski was not properly qualified as a nursing expert. "A person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates." (Evid. Code, § 720, subd. (a).) Once qualified as an expert, a witness may state an opinion that is "[b]ased on matter (including his special knowledge . . .) perceived by or personally known to the witness . . . , whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates . . . ." (Evid. Code, § 801, subd. (b).) The crux of Perez's contention is that Posalski never established that he was an expert on the standard of care for nurses applicable to claims of elder abuse and neglect.

As Perez does not question Posalski's qualifications to render an expert opinion on the causation of Robert Perez's injuries, her objection cannot undermine the grant of summary judgment in the Medical Center's favor. Although Posalski opined that the Medical Center had complied with the applicable standard of care, his principal opinions addressed another element of Perez's claims, namely, causation. Posalski established his qualifications as an expert on Fournier's Gangrene, identified the pertinent injury as an instance of this disease, and opined that the Medical Center could not have predicted or prevented its onset. As we have explained (see pt. B.2., *ante*), this showing carried the Medical Center's burden on summary judgment.[5]

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[5] On appeal, Perez challenges Posalski's declaration on another ground discussed in *Garibay v. Hemmat* (2008) 161 Cal.App.4th 735. There, the defendant in a medical malpractice case sought summary judgment on the basis of a declaration from a medical expert. (*Id*. at pp. 737-742.) Although the expert described facts that he had derived from medical records, the defendant failed to submit the records into evidence. (*Id*. at pp. 741-742.) The trial court admitted the declaration over a hearsay objection, and granted summary judgment in the defendant's favor. (*Id*. at p. 740.) The appellate court

Third, Perez objected to the admission of a medical record mentioned in Posalski's declaration, that is, the wound risk assessment prepared by a nurse at Casa Colina on July 9, 2005. The Medical Center tendered a copy of the assessment, which displays grayish smudges that obscure some of the nurse's notations, but do not render them illegible. Accompanying the assessment was a declaration from Snipes, who stated that she was submitting a copy of a medical record that she had received from Casa Colina pursuant to a subpoena. Perez contended that the assessment was inadequately authenticated as a document obtained by a subpoena, as the Medical Center had not submitted the requisite declaration from the custodian of records for Casa Colina (Evid. Code, § 1560 et seq.). In addition, she contended that the Medical Center had failed to explain the smudges pursuant to Evidence Code section 1402, which obliges a party tendering a document as genuine to account for alterations that are "material to the question in dispute."[6]

These objections fail on the record before us. Evidence sufficient to authenticate a document may arise from many sources, including the conduct of the party objecting to the document's authenticity. (2 Witkin, Cal. Evidence (4th ed. 2000) Documentary Evidence, §§ 7, 21, pp. 139-140, 148.) Evidence Code

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reversed, concluding that the declaration constituted hearsay in the absence of the medical records. (*Id*. at pp. 742-743.) As Perez raised no hearsay objection to Posalski's declaration, she has forfeited her contention.

6 Evidence Code section 1402 provides: "The party producing a writing as genuine which has been altered, or appears to have been altered, after its execution, in a part material to the question in dispute, must account for the alteration or appearance thereof. He may show that the alteration was made by another, without his concurrence, or was made with the consent of the parties affected by it, or otherwise properly or innocently made, or that the alteration did not change the meaning or language of the instrument. If he does that, he may give the writing in evidence, but not otherwise."

section 1414 states: "A writing may be authenticated by evidence that: [¶] (a) The party against whom it is offered has at any time admitted its authenticity; or [¶] (b) The writing has been acted upon as authentic by the party against whom it is offered." In *Ambriz v. Kelegian* (2007) 146 Cal.App.4th 1519, 1527, the parties seeking summary judgment challenged the authenticity of deposition excerpts submitted in opposition to the motion. The appellate court rejected the objection as meritless, reasoning that because the moving parties had relied on the same deposition in support of summary judgment, the objection was "disingenuous." (*Ibid*.)

Here, the opposition Perez attempted to file included a copy of the assessment (without the smudges), and the accompanying declaration from Perez's medical expert, Harris Schoenfeld, M.D., relied on the assessment. As the smudges on the Medical Center's copy of the assessment do not render the underlying notations illegible, and Posalski never suggested that he did not (or could not) consider the notations in interpreting the nurse's assessment, the smudges cannot reasonably be regarded as "material to the question in dispute" (Evid. Code, § 1402). Perez's challenges to the authenticity of the Medical Center's copy are therefore without merit. Accordingly, the trial court properly granted summary judgment.

DISPOSITION

The judgment is affirmed. Respondent is awarded its costs on appeal.

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MANELLA, J.

We concur:

EPSTEIN, P. J.

SUZUKAWA, J.